UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDRE ROYAL, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al.*, Defendants.	)	No. 1:19-cv-5164

MEMORANDUM OF LAW IN SUPPORT OF THE BOARD DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) AND RULE 12(b)(6), AND MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

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PRELIMINARY STATEMENT

Nearly two decades ago, Plaintiff Andre Royal applied for a specific type of total and permanent disability ("T&P") benefits offered by the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan"), and he got the benefit he wanted. Royal is now trying to undo that fully favorable award under the theory that he was always entitled to a different (*i.e.*, higher) level of benefits, and he would have known that, and applied for the higher benefit, if only he had the Plan Document and an adequate summary plan description ("SPD") when he first applied. Royal alleges the Plan and its fiduciaries are liable for depriving him of that material.

Although not pled as a claim for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), this case is precisely that. Royal cannot bring a claim for benefits under 502(a)(1)(B), however, because that claim would be untimely.[1] So—using allegations lifted from a different lawsuit[2]—Royal has tried to transform his claim into breaches of ERISA's disclosure and fiduciary obligations, claims actionable under sections 102 and 404 of ERISA, respectively. Unsurprisingly, cutting and pasting allegations from another case does not work for Royal, and the Complaint should be dismissed, with prejudice, for multiple reasons.

Royal **lacks standing** to pursue his claims, primarily because the premise of the Complaint is false. Royal contends that if he had received a copy of the Plan Document or a legally sufficient SPD, he would have applied for the "correct category" of benefits ("Active Football") as opposed to the category of benefits he actually applied for and received ("Football

[1] Since 2001, the Plan has required that any claim for benefits be brought within 42 months from the date of the final decision.

[2] Royal copied his allegations from the complaint filed in *Hudson v. Nat'l Football League Mgmt. Council, et al.*, No. 1:18-cv-4483 (S.D.N.Y. filed May 22, 2018), even though the cases are fundamentally different. The plaintiff in *Hudson* is challenging a decision on his later reclassification request, whereas Royal is challenging the Board's initial decision on the theory that he was always entitled to a different benefit.

Degenerative"). But what Royal does not understand is that he could never qualify for Active Football benefits. Active Football benefits were reserved for individuals who became totally and permanently disabled within 12 months of when their disability first arose. Royal did not fall into this category because, as the Complaint makes clear, he continued to play professional football for approximately ***two years after*** his disability arose. Royal applied for and received the correct category of benefits. He was not adversely affected in any way—regardless of whether he had the Plan Document, and regardless of what the SPD said or did not say—and he has no standing to bring these claims. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016) (Article III standing requires an actual, concrete injury traceable to the defendant's conduct).

Even if Royal had standing, from the face of the Complaint it is apparent that all of the claims are **barred by the applicable statutes of limitations**, and they should be dismissed, with prejudice, for this reason as well.

Finally, assuming Royal had standing, and putting aside the (un)timeliness of his claims, each claim **fails as a matter of law to state a viable claim**. Count I fails because the SPD complied with federal law. Count II fails because the Complaint does not allege that (i) the Board failed to disseminate the SPD or provide a copy of the SPD or Plan Document on written request, or (ii) the Board knew that Royal did not have these documents and he would be harmed as a result. Count IV fails because it is so vague that it does not give fair notice of the substance of the claim. Count V fails because the Plan's limitations provision does not violate ERISA.

For these reasons, and for the reasons explained more fully below, the Court should dismiss the Complaint with prejudice.[3]

STATEMENT OF FACTS

I. The Plan

The Bert Bell/Pete Rozelle NFL Player Retirement Plan is an ERISA-governed, pension and welfare benefit plan that provides disability benefits to eligible participants ("Players"). The Retirement Board is the Plan's named fiduciary; it has discretionary authority to interpret the Plan and determine all claims for benefits. Plan Doc. § 8.2.[4]

The Plan provides four categories of "T&P" benefits, but only two are relevant here: Active Football and Football Degenerative. **Active Football** benefits are available "if the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled 'shortly after' the disability(ies) arises." Plan Doc. § 5.1(a). The Plan defines "shortly after" as follows:

> A Player who becomes totally and permanently disabled no later than six months after a disability(ies) first arises will be conclusively deemed to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above [defining Active Football benefits], and a Player who becomes totally and permanently disabled more than 12 months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled "shortly after" the disability(ies) first arises, as that phrase is used in subsections (a) and (b) above [defining Active Football benefits].

[3] This memorandum of law addresses every claim brought against the Board Defendants. It does not address Count III, which is brought against the NFL Management Council and the NFL Players Association exclusively.

[4] Unless stated otherwise, this memorandum discusses the Plan Document and SPD in effect at the time of Royal's initial March 2000 application: the 1995 Plan, as amended, and the 1999 SPD. *See, e.g.*, Compl. ¶ 41 ("In March of 2000, Royal requests an application for disability benefits under the 1995 Bert Bell/Pete Rozelle NFL Retirement Plan."). A copy of the 1995 Plan Document is attached to the Declaration of Michael L. Junk as Exhibit A. A copy of the 1999 SPD is attached to the Declaration of Michael L. Junk as Exhibit B. These documents are properly before the Court because they are central to Royal's claims and their authenticity is not in dispute. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991).

Plan Doc. § 5.1. **Football Degenerative** benefits are available if "the disability(ies) arises out of League football activities, and results in total and permanent disability before the later of (1) age 45, or (2) 12 years after the end of the Player's last Credited Season." Plan Doc. § 5.1(c).

In January 1999, the bargaining parties amended the Plan. The amendment added a provision that allowed reclassification of a prior T&P award:

> A Player who becomes totally and permanently disabled and who satisfies the conditions of eligibility for benefits under Section 5.1(a), 5.1(b), 5.1(c), or 5.1(d), or Section 5.5, shall be deemed to continue to be eligible only for the category of benefits for which he first qualifies, unless the Player shows by evidence found by the Retirement Board to be clear and convincing that, because of changed circumstances, the Player satisfies the conditions of eligibility for a benefit under a different category of total and permanent disability benefits.

1/12/99 Joint Res. (Ex. C to Junk Decl.) at 5 (adding Section 5.6 to the Plan).

II. Andre Royal And His Disability Benefits

Royal's NFL career began in 1995. Compl. ¶ 18. Three years into his career, Royal began to experience seizures. Compl. ¶¶ 18, 40. Royal continued to play professional football, however, for two years before retiring from the NFL on May 11, 2000. Compl. ¶¶ 18, 40.

On October 1, 2000, Royal applied for "Football Degenerative" benefits by checking a box next to that category on the application form:

TYPE OF DISABILITY BEING APPLIED FOR (Check each category being applied for):

[ ] Line-of-Duty Disability - Plan § 6
[ ] Active Football Total and Permanent Disability - Plan § 5.1(a)
[ ] Active Nonfootball Total and Permanent Disability - Plan § 5.1(b)
[X] Football Degenerative Total and Permanent Disability - Plan § 5.1(c)
[ ] Inactive Total and Permanent Disability - Plan § 5.1(d)

Compl ¶ 41.

After a full and fair review, the Board determined that Royal was totally and permanently disabled by his seizures, the seizures were related to his NFL football career, and he became totally disabled before the later of (1) age 45, or (2) 12 years after the end of his last Credited

Season. In short, Royal met the requirements for Football Degenerative benefits, so the Board fully granted Royal's application at its October 2001 meeting and awarded him the exact benefits he sought. Compl. ¶¶ 44, 45.

Nearly 15 years later, Royal asked the Plan to review his original award and reclassify his benefits to the higher-paying, Active Football category. Royal maintained the Board incorrectly classified his T&P benefits in 2001. *See* Compl. ¶ 49 (describing Royal's reclassification request, and explaining that Royal "qualified for Active Football T&P Disability in 2000 when he first applied for disability benefits").

In December 2015, the Board denied Royal's request. Compl. ¶ 50. The Board acknowledged that Royal wanted the Board to review its original classification decision, but explained that "[t]he terms of the Plan do not contemplate requests for 'review' like the one [Royal's representative] submitted, and that [2001] decision is now final and not subject to review, even in court, under Plan Section 12.7(a)." 12/2/15 Ltr. fr. M. Miller to A. Royal (Ex. D to Junk Decl.) at 3.[5] The Board therefore considered Royal's request a request for reclassification under the Plan's reclassification provision, which allows reclassification if a Player presents "clear and convincing evidence" of "changed circumstances" that qualify him for a different category of T&P benefits. The Board determined that Royal did not meet the reclassification provision's "changed circumstances" requirement:

> After reviewing your appeal, the Retirement Board determined that your request for reclassification does not meet the Plan's "changed circumstances" requirement. As noted above, you were originally awarded Football Degenerative benefits due to your seizure disorder. Your request for reclassification is unquestionably based upon the same condition, *i.e.*, your seizure disorder. It

[5] The Court may review the Board's decision letter in the context of a motion to dismiss because the letter is central to, and was relied on, in the Complaint. Compl. ¶ 50; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

> merely presents new arguments about the timing of that condition and your total and permanent disability. Because your reclassification request does not present clear and convincing evidence of "changed circumstances," as required by Section 5.5(b), the Retirement Board concluded that it cannot reclassify your existing Football Degenerative benefits to the Active Football category.

12/2/15 Ltr. fr. M. Miller to A. Royal (Ex. D to Junk Decl.) at 3-4.

Royal filed the instant Complaint on June 1, 2019.

ARGUMENT & AUTHORITIES

I. Royal Lacks Standing To Pursue All Claims.

As the party invoking this Court's jurisdiction, Royal must establish subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Article III standing has three essential elements. *First*, a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and quotations omitted). A particularized injury is one that affects the plaintiff in a personal and individual way. *Spokeo*, 136 S. Ct. at 1548. To be concrete, an injury "must actually exist." *Spokeo*, 136 S. Ct. at 1548. A plaintiff cannot satisfy the demands of Article III by "alleg[ing] a bare procedural violation, divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."); *Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (concluding that a plaintiff "cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of [his] entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing."). *Second*, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly… trace[able] to the challenged action of the defendant….'" *Lujan*,

504 U.S. at 560 (citations omitted) (alteration in original). *Third*, it must be "likely," not merely "'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (citation omitted).

A. Royal does not have standing to bring Count I and Count II because he has not been injured by the alleged failure to disclose the Plan or its terms.

Royal lacks standing to pursue Count I and Count II because they rest on the same faulty premise, namely that if Royal had received a copy of the 1995 Plan Document or an SPD describing the Plan's reclassification provision, he would have "correctly appl[ied]" for and received Active Football benefits. *See* Compl. ¶ 43 ("If Plaintiff had the relevant 1995 Plan at the time of filling out his initial application for benefits, he would have known that he qualified for Active Football disability benefits…."); *see also* Compl. ¶¶ 46, 47, 48, 55, 71 (alleging that Royal qualified for, and should have received, Active Football benefits).

When Royal applied, Active Football benefits had three requirements: The Player's disability had to "result[ ] from League football activities," it had to "arise[ ] while the Player is an Active Player," and it had to "cause[ ] the Player to be totally and permanently disabled 'shortly after' the disability arises." Plan Doc. § 5.1(a). The Plan defined "shortly after" and stated that "a Player who becomes totally and permanently disabled more than 12 months after a disability(ies) first arises will be conclusively deemed not to have become totally and permanently disabled 'shortly after' the disability(ies) first arises." Plan Doc. § 5.1.

While Royal focuses on the first two Active Football requirements (and there is no dispute he satisfied those two), the Complaint establishes he did not meet the third, "shortly after" requirement. Royal's disabling impairment (seizures) began in 1998, but he continued to play in the NFL for two more years before becoming totally disabled and retiring in 2000. Compl. ¶¶ 18, 40. Because Royal became totally and permanently disabled ***two years after*** his

seizures began, he is "conclusively deemed not to have become totally and permanently disabled 'shortly after'" his disability arose, Plan Doc. § 5.1, and he could not be entitled to Active Football benefits when he applied in October 2000 or at any point thereafter.

Simply put, if this Court could turn back time and give Royal the Plan Document and all of the information he claims was kept from him, the result would be the same. He applied for and received the highest level of benefits available to him.[6] Nothing the Board did or did not do affected Royal at all, much less in a concrete or particularized way, as required for Article III standing. *Spokeo*, 136 S. Ct. at 1548.

Royal's claim that the SPD failed to explain the Plan's reclassification provision is not actionable for the same reason: The SPD and the reclassification provision did not affect Royal. As an initial matter, the Complaint alleges the Board Defendants concealed the SPD from Royal, Compl. ¶ 10, and if that is true then Royal never read it or relied on it, and he was not impacted by it in any way.[7] In any event, the reclassification provision is irrelevant. Royal believes "he was unable to apply or reapply for the [Active Football] benefits he was originally qualified for," Compl. ¶ 55, but as explained above Royal could never qualify for Active Football benefits—not at the time of his initial application, and not at any time thereafter via reclassification. Furthermore, Royal acknowledges that his request for reclassification did not present any "changed circumstances" whatsoever. *See* Compl. ¶ 47 (alleging that Royal "continues to suffer from ***the same*** debilitating conditions that he suffered from while being an active football player in the NFL," and acknowledging that "[t]he only thing that has changed" is that he "had a

[6] Football Degenerative benefits (the category Royal applied for and received) did not have the "shortly after" requirement. *See* Plan Doc. § 5.1(c) (outlining requirements for Football Degenerative benefits).

[7] Later in the Complaint, Royal alleges that he received the SPD when it was periodically distributed to Players, as required by ERISA section 104. Compl. ¶ 58. Royal may be confusing the SPD with the Plan Document.

representative" when he asked the Board to review his original award). Therefore, Royal was not adversely impacted by the Board's interpretation of the "changed circumstances" provision or what the SPD said or did not say about it, because regardless of how the "changed circumstances" requirement was interpreted, Royal did not satisfy it.

B. Royal does not have standing to bring Count IV because there is no injury fairly traceable to the unidentified 2017 amendment.

In Count IV, Royal seeks a declaration that a "2017 Amendment" does not apply to him. Compl. ¶ 84. The Complaint does not identify the amendment at issue or suggest that it harmed Royal in any way. Absent an injury fairly traceable to the "2017 Amendment," Royal does not have standing to pursue Count IV. *Spokeo*, 136 S. Ct. at 1548. It is difficult to see how a 2017 amendment could have adversely affected Royal, given that he applied for T&P benefits in 2000, he received a fully favorable award, and he has been receiving the highest level of benefits available to him ever since.

C. Royal does not have standing to bring Count V because there is no injury fairly traceable to the Plan's limitation provision or the SPD's description of it.

In Count V, Royal challenges the Plan's limitation provision and the SPD's description of it. Compl. ¶¶ 90-94. The Complaint, however, does not identify how the provision or the SPD harmed Royal "in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (citation omitted). It is not enough merely to point to the provision and baldly allege that it and the SPD's description of it violate ERISA or constitute a fiduciary breach. *See Spokeo*, 136 S. Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."); *Kendall*, 561 F.3d at 121 (rejecting argument that plaintiff has standing to sue for alleged

fiduciary breach under ERISA absent "some injury or deprivation of a specific right that arose from a violation of that duty"). Royal does not have standing to bring Count V.[8]

II. If Royal Has Standing To Bring Count I, It Fails As A Matter Of Law For Additional Reasons.

Count I alleges the SPD violated ERISA section 102(a), 29 U.S.C. § 1022(a), by not adequately explaining two aspects of the reclassification provision: (i) the phrase "clear and convincing evidence," Compl. ¶ 56, and (ii) the "changed circumstances" requirement. Compl. ¶ 58.[9] Count I should be dismissed because it is barred by the statute of limitations and, even if it were not time-barred, Count I does not state a viable cause of action.

A. Count I is barred by the three-year statute of limitations that applies to ERISA section 102 claims.

ERISA section 102 claims have a three-year statute of limitations. *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 744600, at *5 (S.D.N.Y. Feb. 24, 2017) ("ERISA does not prescribe a statute of limitations for disclosure claims under § 102…. [I]n this situation courts apply the most similar state statute of limitations…. The New York statute of limitations applicable to Plaintiffs' disclosure claims is the three-year period governing statutory violations.").

The Complaint shows that Count I was brought outside the three-year limitations period. An SPD was distributed to Players in November 2015. *See* Compl. ¶ 58 (alleging that the SPD was inadequate "[a]t least through the time when the November 2015 SPD was distributed to

[8] That Royal is seeking declaratory and injunctive relief, Compl. ¶ 95, is immaterial—"actual or imminent" harm is a prerequisite to standing. *Lujan*, 504 U.S. at 560 ("[P]laintiff must have suffered an 'injury in fact'… [which is] 'actual or imminent, not 'conjectural' or 'hypothetical[.]'") (citations omitted).

[9] Count I refers to "the Plan and SPD." *See* Compl. ¶ 53. These are separate documents. ERISA section 102 applies to SPDs, not plan documents. *See* 29 U.S.C. § 1022 (imposing requirements on "summary plan descriptions").

player-participants…"). Royal learned about the Board's interpretation of the reclassification provision "[o]n December 2, 2015." Compl. ¶ 50. If the SPD did not adequately explain the reclassification provision or how the Board applied it, Royal knew or reasonably should have known that on December 2, 2015. The statute of limitations ran from that date and expired on December 2, 2018.[10] Accordingly, Count I is untimely.

B. Count I fails to state a claim because the SPD complied with the requirements of ERISA section 102.

Section 102 of ERISA is titled "Summary Plan Description." Subsection (a) mandates that an SPD "shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Subsection (b) requires that an SPD contain, among other information, "the plan's requirements respecting eligibility for participation and benefits," and the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). As the title and text of section 102 illustrates, its focus is limited to ensuring that an SPD discloses material ***plan terms*** to participants. *See generally* 29 C.F.R. § 2520.102-3 (2018) ("The summary plan description must accurately reflect the ***contents of the plans*** as of the date not earlier than 120 days prior to the date such summary plan description is disclosed.") (emphasis added).

Royal cannot dispute that the SPD complied with section 102 of ERISA, in that it accurately summarized the actual terms of the Plan that was collectively bargained by the NFL Management Council and the NFL Players Association. *See, e.g.*, Compl. ¶ 57 (acknowledging

[10] Even if Royal did not receive the SPD through periodic distributions, he received a copy of the SPD and Plan Document "that applied to his original application" in February 2016. Compl ¶¶ 50, 53. The three-year statute of limitations for an ERISA section 102 claim expired in February 2019, at the latest.

that the SPD "explained that to qualify for a reclassification, the participant 'must be able to demonstrate that, because of changed circumstances,' [the plan participant] satisfy[ied] the conditions of eligibility for a benefit under a different category of total and permanent disability benefits") (alteration in original).

Royal alleges the SPD should have done more, but section 102 does not expressly require that an SPD set forth the plan fiduciaries' discretionary ***interpretation*** of plan terms. No case imposes such a requirement, either. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 194 (2d Cir. 2007) (rejecting argument that the defendants violated section 102 by not including in an SPD the actuarial assumptions used for calculation of early retirement benefits, and stating: "[N]either ERISA nor the Labor Department's regulations require a summary plan description to describe or illustrate every method by which a plan benefit may be limited under an early payment option or similar such limitation."). Cases finding section 102 violations deal with SPDs that fail to disclose, describe, or explain the actual terms of a plan. *See, e.g.*, *Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013) (finding a violation of section 102 where "the SPDs fail[ed] to clearly identify the circumstances that [would] result in an offset" under the plan); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 111 (2d Cir. 2003) (holding that SPD violated section 102 where it did not properly disclose a crucial eligibility requirement stated in the plan itself).

Royal's section 102 allegations contradict the realities of plan administration. Every plan has language that is subject to interpretation, and it has been blackletter law for decades that a plan administrator may be given discretionary authority to interpret such language. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) ("A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's

interpretation will not be disturbed if reasonable."). Still, section 102 of ERISA has never compelled plan administrators to explain and illustrate the impact of every discretionary interpretation in an SPD, as Royal alleges the Board should have done here. It would be impractical for a fiduciary to devise an SPD that explained how each plan term is or might be interpreted, and impossible to produce and disseminate an updated SPD every time a new or slightly different interpretation took shape.

III. If Royal Has Standing To Bring Count II, It Fails As A Matter Of Law For Additional Reasons.

Count II alleges the Board Defendants breached fiduciary duties imposed by section 404(a) of ERISA, 29 U.S.C. § 1104(a), by not disclosing the Board's interpretation of the "changed circumstances" requirement, failing to provide an SPD or the Plan Document, and failing to disclose the standards for the different T&P benefit categories. Compl. ¶¶ 66-67. Royal claims the Board acted intentionally and fraudulently to ensure that Players did not "apply for the correct benefits they qualified for." Compl. ¶ 68; *see also id*. ¶ 42 (alleging that "information was intentionally and fraudulently concealed from Plaintiff in order for him to mistakenly apply for benefits in a category that he did not fit into"); *id*. ¶ 48 (alleging "fraudulent and intentional concealment"); *id*. ¶ 55 (same); *id*. ¶ 68 (alleging that "Defendants' fraudulent concealment" was "part of a pattern of fraudulent concealment"); *id*. ¶ 71 (alleging "intentional and fraudulent" conduct).

Count II fails for two reasons: It is untimely and it does not plead fraud with particularity as required by Rule 9(b).

A. Count II is untimely under ERISA's "Limitation of Actions" provision.

ERISA section 413, 29 U.S.C. § 1113, restricts the timeframe in which a breach-of-fiduciary duty action may be brought. It states:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. Count II is untimely under every part of the statute.

1. ERISA section 413(1) bars Count II because it was brought more than six years after the alleged breaches, and more than six years after the last date the Board could have cured its alleged breaches.

Section 413(1) is a statute of repose; it bars any claim brought more than six years after the date of the purported violation or breach, or, in the case of an omission, the last date on which the defendant could have cured the breach or violation. *California Pub. Emps' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (citing to 29 U.S.C. § 1113 as an example of a statute of repose); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 188 (2d Cir. 2001).

Count II specifies that the Board breached its fiduciary duties "in advance of the time that Plaintiff filed his initial claim for benefits." Compl. ¶¶ 66, 67; *see also* Compl. ¶ 68 ("Board Defendants breached their strict fiduciary duties… by intentionally and fraudulently concealing the 1995 Plan from Plaintiff at the time of the original application…"). Royal applied for T&P benefits on October 1, 2000. Compl. ¶ 43. He therefore had until no later than October 1, 2006 to bring his breach-of-fiduciary-duty claim under subsection (1)(A). Royal missed this filing deadline by nearly 13 years.

To the extent the Board's alleged breach can be characterized as an "omission," subsection (1)(B) states that any claim must be brought within six years from "the latest date on which the fiduciary could have cured the breach." 29 U.S.C. § 1113(1)(B). "[T]he last opportunity to cure in an omissions case is on the last date the defendant could have averted [p]laintiffs' detrimental reliance on the omitted information." *Moyle v. Liberty Mut. Ret. Benefit Plan*, No. 10CV2179-GPC(MDD), 2016 WL 7242021, at *13 (S.D. Cal. Dec. 15, 2016). Here, the last date the Board could have averted Royal's detrimental reliance and cured its alleged breach is October 18, 2001—the date that Royal was awarded Football Degenerative benefits, Compl. ¶¶ 44, 45—because on that date the Board's decision became final, and Royal was subsequently "lock[ed] into [that] lower category of benefits." Compl. ¶¶ 70, 71. Under subsection (1)(B), Royal had until October 18, 2007 to bring Count II. He missed this deadline by 11½ years.

2. ERISA section 413(2) bars Count II because Royal had actual knowledge of the alleged breaches more than three years before bringing suit.

Subsection 413(2) allows a breach-of-fiduciary-duty claim to be brought within "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation," 29 U.S.C. § 1113(2), but it applies only if its three-year limit is more restrictive than the six-year limit imposed by subsection (A). That is not the case here, so subsection 413(2) does not apply. But even if subsection 413(2) did apply, Count II is untimely.

Royal received the SPD when it was distributed in 2015, Compl. ¶ 58; he learned about the Board's interpretation of the reclassification provision on December 2, 2015, Compl. ¶ 50; and he received a copy of the Plan Document that was allegedly withheld from him on February 1, 2016, Compl. ¶ 50. Therefore, if the SPD or Plan Document did not adequately explain the Board's interpretation of the reclassification provision, Royal would have known that by

February 1, 2016, at the latest. Likewise, if the Plan Document or SPD would have been useful to Royal when he applied for benefits in 2000, he would have known that too no later than February 1, 2016. In short, Royal had at his disposal every "fact" giving rise to the breach-of-fiduciary-duty claims stated in Count II on February 1, 2016, and so the deadline for bringing the claims under subsection 413(2) would have been February 1, 2019. *Muehlgay v. Citigroup, Inc.*, 649 Fed. App'x 110, 111 (2d Cir. 2016) ("A plaintiff has 'actual knowledge' of a breach or violation 'when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act.'… A plaintiff, however, 'need not have knowledge of the relevant law[.]'") (citing *Caputo*, 267 F.3d at 193). Because that date is not earlier than the six-year deadline imposed by subsection 413(1), subsection 413(2) does not apply. It makes no difference if it did apply, because Royal missed the more generous deadline by at least three months.

3. Royal cannot rely on the "fraud or concealment" exception in ERISA section 413 because the Complaint does not plead fraud with particularity.

Perhaps to benefit from section 413's "fraud or concealment" exception, the Complaint alleges the Board intentionally engaged in "a pattern of fraudulent concealment." Compl. ¶ 68. These allegations do not bring Count II within the "fraud or concealment" exception because, "[t]o qualify for the third period [under ERISA section 113], a plaintiff must allege fraud or concealment in accordance with Federal Rule of Civil Procedure 9(b)'s particularity requirement, which requires a plaintiff to 'specify the time, place, speaker, and content of the alleged misrepresentations' or omissions." *Caufield*, 2017 WL 744600, at *7 (citation omitted); *see also Caputo*, 267 F.3d at 191 ("To get the advantage of the six-year statute of limitations, [a complaint] must plead fraud with the requisite particularity."); *Grynberg v. Eni S.p.A.*, No. 6-cv-6495, 2007 WL 2584727, at *4 (S.D.N.Y. Sept. 5, 2007) ("In the case of fraudulent

concealment, Rule 9(b) requires the plaintiff specify in its pleadings '(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled the plaintiff, and (4) what defendant obtained through the fraud.'").

The Complaint does not plead fraud with particularity. It contains bald allegations of intentional and fraudulent concealment, but no facts concerning ***when*** Royal made his "repeated requests" for the Plan Document, Compl. ¶¶ 10, 68, ***to whom*** those requests were directed, or ***what response*** he received. Furthermore, the few facts that are in the Complaint do not plausibly suggest that the Board intentionally concealed anything from Royal. The Complaint admits that when Royal requested an application for disability benefits in March of 2000, Plan staff sent Royal "the application for benefits and a letter stating that he would be receiving a copy of the Plan" Document. Compl. ¶ 41. If anyone intended to sabotage Royal's application for benefits by concealing the Plan Document, they would not mention it at all, much less volunteer to provide it at the time of his application.

The "obvious alternative explanation" to Royal's concealment allegations is that someone simply forgot to give him the Plan Document.[11] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (noting that allegations that are reasonably suggestive of lawful conduct fail to state a claim as a matter of law). An innocent oversight is not a breach of fiduciary duty. *See Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212, 227 (W.D.N.Y. 1999) (concluding that providing erroneous benefit estimates due to honest mistake did not constitute a fiduciary breach where defendants did not actively or knowingly mislead plaintiffs or act in bad faith). Absent more specific factual allegations that meet Rule 9(b)'s particularity requirement, the Complaint

[11] The Board Defendants do not concede that Royal did not receive a copy of the Plan Document.

has "not nudged [Royal's] claims across the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, and he cannot take advantage of section 413's "fraud or concealment" exception. *See also Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) ("Acknowledging that parallel conduct was consistent with an unlawful [conspiratorial] agreement, the Court [in *Twombly*] nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed.").[12]

B. Count II fails to state a claim for breach of fiduciary duty.

ERISA provides that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" for the purpose of providing them benefits. 29 U.S.C. § 1104(a)(1)(A). It also requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). These are referred to as ERISA's duties of loyalty and prudence. The Complaint does not adequately allege that the Board violated either duty.[13]

[12] "[T]o be entitled to the six-year 'fraud or concealment' limitations period, [] courts require that, in addition to alleging a breach of fiduciary duty (be it fraud or any other act or omission), the plaintiff must also allege that the defendant committed either: (1) a 'self-concealing act'—an act committed during the course of the breach that has the effect of concealing the breach from the plaintiff; or (2) 'active concealment'—an act distinct from and subsequent to the breach intended to conceal it." *Caputo*, 267 F.3d at 189 (citation omitted). The Complaint does not satisfy this requirement.

[13] As a practical matter, Royal cannot seriously allege that the Board had any improper motive. Three of the six voting members of the Board—Sam McCullum, Robert Smith, and Jeff Van Note—are former players appointed by the NFL Players Association. Compl. ¶¶ 19-20, 25-27. These three Board members are just like Royal, and thus they plainly share his interest in a fair administration of the Plan. Royal's accusation that the Board wanted to save costs by ensuring that Players did not receive benefits that they were entitled to, *e.g.*, Compl. ¶ 68, is baseless. Every court to address the question has held that the Board has no such conflict of interest as a matter of law. *See, e.g.*, *Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F. Supp. 2d 682, 690-91 (D. Md. 2011); *Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 468 F.3d 1082, 1086 (8th Cir. 2006); *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999).

1. Count II does not adequately allege that the Board breached its fiduciary duties by failing to provide the Plan Document or SPD.

Section 104 of ERISA requires plan administrators to periodically disseminate SPDs, 29 U.S.C. § 1024(b)(1)-(3), and provide plan documents and SPDs to participants "upon written request." 29 U.S.C. § 1024(b)(4).[14]

The Complaint does not adequately allege the Board violated section 104's disclosure obligations. The Complaint indicates the Board periodically supplied SPDs to Players, as required. *See, e.g.*, Compl. ¶ 53 ("Publication of the SPD is governed by ERISA § 104(b)[.]"); Compl. ¶ 58 (alleging that 2015 SPD "was distributed to player-participants"). And the Complaint does not allege that Royal made, or the Plan failed to respond to, a "written request" for the Plan Document or the SPD.

Even if the Complaint adequately alleged the Board violated section 104, a section 104 violation does not automatically give rise to fiduciary liability.[15] *See Watson v. Deaconess Waltham Hosp.*, 141 F. Supp. 2d 145, 150 (D. Mass. 2001) ("[A] mere failure to comply with ERISA's statutory disclosure requirements will not support a claim of breach of fiduciary duty under ERISA § 404(a)."). A breach-of-fiduciary-duty claim may exist where a plan

[14] Royal cannot rely on ERISA's general fiduciary duties to impose additional disclosure obligations not specifically required under section 104. *See Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (rejecting argument "that ERISA's general fiduciary duty provision, § 404(a)(1)(A), requires plan fiduciaries to furnish documents to participants and beneficiaries in addition to the documents that ERISA's specific disclosure provision, § 104(b)(4), requires the plan administrator to furnish" on the basis that "[s]uch a holding would conflict with the principle that specific statutes govern general statutes").

[15] Statutory penalties under ERISA section 502(c), 29 U.S.C. § 1132(c), are the normal remedy for a section 104 violation. Royal has no remedy under that part of the statute because it would be barred by the applicable three-year limitations period. *See Leonelli v. Pennwalt Corp.*, No. 82-CV-221, 1988 WL 108594, at *5 (N.D.N.Y. Oct. 17, 1988) ("As § 1132(c) liability [for failure to comply with a request for any information] is a creature of statute… the relevant statute of limitations is three years."), *aff'd in part, rev'd in part*, 887 F.2d 1195 (2d Cir. 1989) (upholding district court's decision to bar amendment to ERISA nondisclosure claim as futile based on applicable three-year limitations period). In addition, Royal has not alleged he made a "written request" for the Plan Document or SPD, as required under ERISA section 104. 29 U.S.C. § 1024(b)(4) ("The administrator shall, upon written request of any participant… furnish a copy of the latest updated [SPD]… or any other instruments under which the plan is established or operated.").

administrator acts from a position of superior knowledge and "'affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm.'" *Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517, 552 (S.D.N.Y. 2015) (quoting *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001)), *aff'd*, 862 F.3d 198 (2d Cir. 2017). However, the Complaint does not allege that the Board or any other fiduciary knew that Royal did not have a copy of the Plan Document or SPD, or that he was at any disadvantage when he applied for disability benefits in 2000. The alleged facts (as opposed to unsupported, conclusory allegations) establish no more than that Plan staff volunteered to provide the Plan Document, and Royal did not receive it. Compl. ¶ 41.

2. Count II does not adequately allege that the Board breached its fiduciary duties by failing to disclose its interpretation of the reclassification provision.

Allegations concerning the Board's failure to disclose its interpretation of the Plan's reclassification provision fail to state a claim absent allegations that the Board knew that its failure to disclose that particular information to Royal, at the time of his initial application, would lead to harm. *See Osberg*, 138 F. Supp. 3d at 552 (a breach-of-fiduciary-duty claim may arise if a fiduciary "affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm") (quotation marks and citation omitted). The Complaint does not (and cannot) plausibly allege that the Board had the requisite level of knowledge or intent because, as explained above, reclassification was never an option for Royal. He applied for and received the highest level of benefits available to him.[16]

[16] *See* Section I.A., *supra* (describing Royal's ineligibility for Active Football T&P benefits and admitted inability to meet reclassification standard).

IV. If Royal Has Standing To Bring Count IV, It Should Be Dismissed Because It Fails To Give Defendants Notice Of The Claims Against Them.

Although Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief," that statement must be sufficient to "give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Count IV does not give fair notice of what the claim is, or the grounds on which it rests, because it does not identify "the 2017 Amendment" or how it could affect Royal. The Complaint makes no mention of "the 2017 Amendment" outside of Count IV.

V. If Royal Has Standing To Bring Count V, It Should Be Dismissed Because It Is Untimely And It Fails To State A Viable Cause Of Action.

Royal alleges the Plan's limitations provision is void as against public policy "[t]o the extent" it conflicts with ERISA section 413 if it "attempts to relieve [] Defendants of their responsibility or liability to discharge their fiduciary duties under ERISA" in violation of section 410 of ERISA. Compl. ¶ 93. If the limitations provision violates ERISA, Royal also alleges it was a fiduciary breach to adopt such a provision and disseminate an SPD discussing it. Compl. ¶ 94. Finally, Royal alleges the SPD violates ERISA section 102 because it does not contain sufficient explanations or illustrations of circumstances that might toll the limitations period. Compl. ¶ 90.

Independent of whether Royal has standing to pursue Count V, the claim fails because it is untimely and it fails to state a claim as a matter of law.

A. Count V is barred by the three- and six-year statutes of limitations applicable to ERISA section 102 and 404 claims, respectively.

The Complaint acknowledges the Plan and SPD have included the allegedly improper language since 2009 and 2010, respectively. Compl. ¶¶ 87-89. Any section 102 claim

challenging the SPD's discussion of the limitations provision should have been filed by 2013. *Caufield*, 2017 WL 744600, at *5 (holding that ERISA section 102 claims are governed by a three-year statute of limitations period). Any fiduciary-breach claim under section 404 of ERISA should have been brought by 2015, at the latest. 29 U.S.C. § 1113 (breach of fiduciary duty claim must be brought within six years of the breach, or three years of plaintiff's knowledge of the breach, whichever is earlier). Count V is time-barred.

B. The Plan's limitation provision does not violate ERISA.

Setting aside the (un)timeliness of Count V, Royal's claim that Plan Section 11.7(b) conflicts with section 413 of ERISA and violates section 410 of ERISA has no merit.[17] First, Plan Section 11.7(b) does not conflict with section 413 of ERISA. It is nearly identical to section 413 of ERISA and specifically states that it applies "except as provided in ERISA section 413." Compl. ¶ 87.

Second, Royal has no claim even if the Plan's limitation period meaningfully varies from ERISA section 413. ERISA plans are permitted to adopt different limitations provisions. *See Hewitt v. W. & S. Fin. Grp. Flexible Benefits Plan*, No. 17-5862, 2018 WL 3064564, at *2 (6th Cir. Apr. 18, 2018) (holding that a plan could adopt a limitations provision different than the ERISA section 413 default) (citing *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99,

[17] Section 11.7(b) of the Plan (amended and restated as of April 1, 2009), provides:

> Except as provided in Section 11.7(a) [regarding claims for benefits], no action alleging an omission, violation, or breach of any responsibility, duty, or obligation imposed by this Plan (or any internal rule, guideline, or protocol) or any applicable law may be commenced after the earlier of—(1) six years after the date of the omission, violation, or breach, or (2) three years after the earliest date on which the plaintiff had actual or constructive knowledge of the omission, violation, or breach, except as provided in ERISA section 413 (but only where the fraud or concealment is separate from the offense and intended to conceal the existence of the offense).

Ex. E to Junk Decl.

107 (2013)). Royal offers no reason why the Plan's limitation period is unreasonable or unenforceable as a matter of federal law.

Third, section 410 of ERISA concerns "Exculpatory Provisions," *i.e.*, those that purport to exonerate fiduciaries or "relieve" them "from responsibility or liability." 29 U.S.C. § 1110(a). Repose and limitations provisions do not exonerate or relieve a fiduciary from liability, as Royal claims; they just limit the timeframe in which an action seeking to hold them accountable can be brought. *See Heimeshoff*, 571 U.S. at 114-15 (finding a plan's limitations provision to be consistent with ERISA).

Royal's remaining allegation that the SPD violated ERISA section 102 by failing to "provide any explanation, examples, or illustration[s] of what facts would result in an exception" to a strict application of the statute of limitations is deficient.[18] Section 102 of ERISA does not require a plan administrator to imagine scenarios that might toll a statute of limitations and then provide that legal advice to a participant in an SPD. *See* 29 U.S.C. § 1022(b) (listing the required contents of an SPD); 29 C.F.R. § 2520.102-3 (same).

[18] The 2010 SPD summarizes the Plan's limitation provision as follows:

> With respect to all other types of claims [i.e., other than a claim for benefits], you may not commence a legal action in a court after the earlier of—
>
> • six years after the date of any omission, violation, or breach of any responsibility, duty, or obligation imposed by the Retirement Plan or applicable laws, or
>
> • three years after the earliest date that you knew or should have known of any such omission, violation, or breach, except that, depending on the facts, certain exceptions may apply.
>
> If you do file a legal action after these limitations periods have expired, the court may dismiss your claim.

Ex. F to Junk Decl. at 38.

VI. The Court Should Strike Royal's Jury Demand.

Royal's request for a "jury" (*see* Compl. at 1) should be denied. It is well-settled that an ERISA plaintiff is not entitled to a trial by jury. *See O'Hara v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 642 F.3d 110, 116 (2d Cir. 2011) ("[T]here is no right to a jury trial in a suit brought to recover ERISA benefits."); *Tracey v. Mass. Institute of Tech.*, No. 16-11620, 2019 WL 1005488, at *2 (D. Mass. Feb. 28, 2019) ("The great weight of authority holds that no right to trial by jury applies to actions for breach of fiduciary duty under ERISA."). Therefore, even if Royal had standing, timely filed his Complaint, and stated viable claims (which he has not), his jury demand is improper.

CONCLUSION

For the foregoing reasons, the Court should dismiss Royal's Complaint with prejudice and strike the jury demand.

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/s/

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